RECORD AND BRIEFS

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No. 16-1144

In the Supreme Court of the United States

CARLO J. MARINELLO, II,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS AS *AMICI* CURIAE SUPPORTING PETITIONERS

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INTERESTS OF *AMICI*

Amici Curiae, the Chamber of Commerce of the United States of America (the "Chamber") and the National Federation of Independent Business (the "NFIB"), submit this brief pursuant to Rule 37 of the Rules of the Supreme Court.[1]

The Chamber is the world's largest business federation. It represents the interests of more than three million businesses of every size, in every sector, and from all regions of the United States. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The NFIB is the nation's leading small business advocacy association, representing member businesses in all fifty states and the District of Columbia. The NFIB's members range from sole proprietors to firms with hundreds of employees, and collectively they reflect the full spectrum of America's small business owners. The NFIB defends the freedom of small business owners to operate and grow their businesses and promotes public policies that recognize and encourage the vital contributions that small businesses make to our national economy.

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[1] All parties who appear in this appeal have consented to the filing of this brief. The parties' consents are submitted herewith. No portion of this brief was authored by counsel to any party in this action, nor has anyone other than *Amici* contributed monetarily to the preparation of this brief.

The Chamber's and the NFIB's interests in this case derive from the fact that the Second Circuit's interpretation of the omnibus clause of 26 U.S.C. § 7212(a) (the "Omnibus Clause") is so overbroad and expansive that it threatens to criminalize a wide array of lawful business conduct, vastly increase the costs to small businesses of ordinary course tax compliance, result in businesses paying more taxes than they owe in order to avoid being accused of a felony, and chill the important role that taxpayer challenges play in the development of the tax law.

The Chamber, the NFIB, and their members have an interest that the Omnibus Clause be interpreted, consistent with its purpose, to address attempts by a taxpayer to interfere with a known Internal Revenue Service ("IRS") investigation, examination, or proceeding. The Chamber, the NFIB, and their members also have an interest in a workable tax regime that allows taxpayers, including small businesses, to implement and follow record-creation and record-maintenance procedures that are reasonable, rather than overly burdensome, without the fear that failing to create or maintain a specific record may be charged, or threatened to be charged, as a felony. Finally, the Chamber, the NFIB, and their members have an interest that economic legislation be given predictable, concrete interpretations that provide clear guidance of what is prohibited, and avoid vague constructions that may serve as the basis for selectively prosecuting disfavored businesses and individuals for who they are, rather than what they have done.

SUMMARY OF THE ARGUMENT

The Second Circuit below adopted an interpretation of the Omnibus Clause that is so sweeping and overbroad that it would criminalize a vast array of otherwise lawful conduct, chill economic activity, and provide the IRS with a weapon with which to target particular small businesses, not because of their conduct, but because of their identity. The Second Circuit's interpretation would also chill the development of the tax law and place the power to determine what the law is not in the hands of the courts, but in the hands of the Executive.[2] Unless this Court limits its reach, the Omnibus Clause will resemble less a statute protecting the IRS from obstructive conduct, and more the sort of broad and vague enactment of which this Court has repeatedly disapproved. See, e.g., Johnson v. United States, 135 S. Ct. 2551 (2015); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

For substantially the reasons argued by the Petitioner and set out by Judges Jacobs and Cabranes in their opinion dissenting from the denial of rehearing *en banc*, United States v. Marinello, 855 F.3d 455 (2d Cir. 2017), this Court should limit the application of the Omnibus Clause to those cases in which the defendant was aware of some ongoing IRS process or proceeding and acted to obstruct or impede it. See

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[2] *Amici* do not address the specific circumstances of the Petitioner's convictions, except to observe that they illustrate the lack of any need for a catch-all provision in light of the specific prohibitions on tax evasion already found in the United States Internal Revenue Code.

United States v. Kassouf, 144 F.3d 952, 955-58 (6th Cir. 1998); United States v. Popkin, 943 F.2d 1535, 1543 (11th Cir. 1991) (Roney, J., dissenting) ("The legislative history reveals that Congress intended only to prohibit interference with IRS agents, either through physical or verbal threats or through other actions which impeded their efforts to enforce the tax code."); see also United States v. Aguilar, 515 U.S. 593, 599 (1995) (holding nearly identical provision in 18 U.S.C. § 1503(a) prohibiting obstruction of "the due administration of justice" required defendant to "inten[d] to influence judicial or grand jury proceedings"). *Amici* submit this brief to highlight the practical effects that the Second Circuit's interpretation of the Omnibus Clause will have on economic activity and the development of the law if it is not overturned.

ARGUMENT

I. The Second Circuit's Standard Could Subject a Wide Range of Innocent Economic Activity to Criminal Prosecution

A. Virtually Any Economic Activity Could Make the IRS's Job More Difficult

The Second Circuit held that an act that has the effect of impeding or obstructing the due administration of the Internal Revenue Code (the "Code"), or endeavoring to do so – whether or not actually directed at the IRS or its processes – constitutes a felony under the Omnibus Clause. United States v. Marinello, 839 F.3d 209, 221-22 (2d Cir. 2016). In the court's words, "section 7212(a)'s omnibus clause prohibits any effort to obstruct the

administration of *the tax code*, not merely of investigation and proceedings conducted by the tax authorities." Id. at 221 (citation and internal quotation marks omitted). The sole limit on that sweeping holding is the requirement that the act be done "corruptly." Id. However, as explained further below, that caveat offers little comfort for businesses that attempt to comply in good faith with the Code.

It is difficult to overstate the sweeping nature of the conduct that could trigger criminal prosecution under the Second Circuit's ruling. "To 'obstruct or impede' is to hinder or prevent from progress; to slow or stop progress; or to make accomplishment difficult and slow." United States v. Sorenson, 801 F.3d 1217, 1229 (10th Cir. 2015) (upholding Omnibus Clause jury instruction); see also 1st Cir. Pattern Crim. Jury Instruction 4.26.7212 (2017) ("To 'obstruct or impede' means to hinder, interfere with, create obstacles or make difficult."); 11th Cir. Pattern Crim. Jury Instruction O111 (2016) ("To 'try to obstruct or impede' is to consciously attempt to act, or to take some steps to hinder, prevent, delay, or make more difficult the proper administration of the Internal Revenue laws."). Accordingly, any act that has the effect of making it more difficult or time-consuming for the government to collect tax revenues or for the IRS to investigate and audit tax returns and determine the amount of taxes due could conceivably, under the Second Circuit's interpretation, trigger the Omnibus Clause and subject a defendant to years in prison.

The Second Circuit itself observed that "the administration of the Internal Revenue Code encompasses a vast range of activities," including

"mailing out internal revenue forms; answering taxpayers' inquiries; receiving, processing, recording and maintaining tax returns, payments and other taxpayers' submissions; as well as monitoring taxpayers' compliance with their obligations." Marinello, 839 F.3d at 221 (citation and internal quotation marks omitted). The government rightly notes these activities are "ubiquitous." Br. for the United States in Opp'n 9 (May 22, 2017). A taxpayer's actions or inactions can interfere with tax administration in myriad ways. The Indictment here included failing to maintain corporate books and records, making payments in cash, and failing to respond to an accountant's request for information. Marinello, 839 F.3d at 213. The next case could include claiming a deduction that the prosecution (after the fact) determines should have been disallowed (even if the IRS never sought the disallowance) or failing to save a receipt that the prosecution believes (in retrospect) the IRS would have liked to have seen (even if the IRS never in fact requested the receipt or even conducted an audit). But for the Second Circuit's overbroad reading of the Omnibus Clause, however, none of these actions have been traditionally understood to support felony charges.

It is a fundamental axiom of our law, well-established for decades, that "[a]ny one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes." Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934) (Hand, J.) (citations omitted). The Second Circuit's interpretation encompasses, and potentially criminalizes, virtually all activity in the life

history of a business taken – as our free market economy expects – to incur the lowest tax burden possible or taken for purely business reasons but which have the effect of making the IRS's job more difficult. A few examples illustrate the point.

Business Structuring. The efforts of a fledgling business to maximize its tax efficiency may begin with the choice of the form in which to conduct its activity. The Code imposes different obligations on businesses and their owners depending on which form they choose. For example, if a business is organized as a corporation, the Code generally imposes two layers of taxes: one on the net income of the corporation, and a second when the corporate profits are distributed to shareholders. By contrast, if a business is organized as a "subchapter S corporation" or a partnership, the Code generally imposes only one layer of tax (i.e., at the owner level). See 26 U.S.C. § 11 (2012) (imposing tax on the net income of corporations); id. §§ 1363, 1366 (imposing tax at shareholder level in case of a subchapter S corporation); id. §§ 701, 702 (imposing tax at partner level in case of a partnership). Similarly, the expansion of a business by acquiring or merging with a competitor can be planned so that it is tax-free to all parties by ensuring that certain requirements are met. Indeed, the Code includes extensive rules designed to *incentivize* taxpayers to plan mergers so that they do qualify as tax-free. See id. §§ 351-368 (referred to as "subchapter C"). In a similar way, the Code encourages taxpayers to plan exchanges of like-kind property to qualify as tax-free under the like-kind exchanges rules. See id. § 1031.

Decisions about structuring one's business and planning corporate transactions are accordingly directly relevant to both the amount of taxes due and the ability of the IRS readily to determine the amount of taxes due. A business's decision to set up a complex structure, or to do business through separate entities (often done for liability management reasons) could be seen to impede "the administration of *the tax code*," Marinello, 839 F.3d at 221, in the sense of making the IRS's efforts to examine more difficult (had the IRS chosen to examine). See, e.g, Guidant LLC v. Comm'r, 146 T.C. No. 5 (2016) (taxpayer did business through multiple entities and argued IRS adjustment needed to be broken down by entity and not aggregated as the IRS had done). In theory, such decisions could subject the business to prosecution under the Omnibus Clause without any proof that there were any taxes avoided and even if the IRS did not, in fact, conduct an examination.

Deduction of Expenses. There is no business that does not confront the issue of when to spend money and on what. The Code imposes dramatically different consequences on expenditures depending on their purpose and character. An expenditure that is not "ordinary and necessary" to the conduct of the trade or business is not deductible. 26 U.S.C. § 162. Whether a specific expense meets that standard is often unclear. See, e.g., Storey v. Comm'r, 103 T.C.M. (CCH) 1631 (2012) (rejecting IRS's challenge that taxpayer's documentary filmmaking activity was a "hobby," and instead finding that filmmaking expenses were deductible where books and records demonstrated filmmaking was "conducted with continuity and regularity" and she "was engaged in activity for

profit"). Additionally, an expenditure that meets the standard may still not be deductible currently – e.g., amounts spent to acquire or improve long-term business assets, such as purchasing a new building or improving machinery – but may instead be required to be capitalized and then deducted over a number of years. See 26 U.S.C. §§ 263, 263A; see also id. § 197; Newark Morning Ledger Co. v. United States, 507 U.S. 546, 570-71 (1993) (holding, in the face of an IRS challenge, that a taxpayer satisfied "its substantial burden" of satisfying the requirements to depreciate an intangible asset; in part spurring simplification of the Code).

Under the Second Circuit's interpretation, a creative (or aggressive) prosecutor could root through a business's records to find expenses that it (post-hoc) determines were personal and thus should not have been deducted or were not supported by a record (and thus would have made an audit more difficult) even in the absence of evidence of any tax due and owing. It is not difficult to imagine the government taking the position that determining the proper treatment of an expenditure would be less difficult if the taxpayer had created (or maintained) more extensive documentation of the reason for the expenditure and the benefits derived. Nor is it difficult to imagine the government taking the position (either during an IRS examination or, after the fact, in a criminal case) that the characterization in a close case of an expense as a business expense (with the result that less tax revenue is collected) would impede the administration of the Code. In each of those instances, the taxpayer's conduct could constitute obstruction under the Second Circuit's interpretation of the Omnibus Clause.

Timing of Revenue Recognition. If a business is generating revenue, its tax bill will be significantly impacted by *when* that revenue is recognized for tax purposes. But the timing rules are notoriously complex and highly dependent upon the specific facts and circumstances of the situation. Mistakes are common enough that for taxpayers who discover their own mistakes before the IRS does, the IRS has special procedures and rules for the taxpayer to follow to correct the mistakes, which include alerting the IRS to the mistake. The IRS's job is surely made more difficult by a taxpayer who fails to find and correct its own mistake; under the Second Circuit's interpretation of the Omnibus Clause, such failure may also be a felony.

Employee Tax Withholding. In the ordinary course of its activity, a business will make decisions regarding who to hire, and whether to hire employees or to rely on independent contractors. Those decisions impact the administration of the Code, which requires employers to withhold federal taxes from their employees' wages and pay over those withheld taxes to the IRS. Wage withholding is required by the tax law in part to facilitate compliance by the individual employees; this, of course, makes tax administration less burdensome for the IRS. But wage withholding applies only if a worker is an "employee," and does not apply if the worker is an independent contractor. See IRS, U.S. Dep't of the Treasury, Pub. No. 1779, Independent Contractor or Employee? (2007) (describing the facts and circumstances to be evaluated in order to determine whether someone is an employee or independent contractor in any given case); see also Mayo Found. for Med. Educ. & Research v. United

States, 562 U.S. 44, 59-60 (2011) (addressing whether medical residents are "employees" or "students" for U.S. tax purposes). Under the Second Circuit's interpretation, a business that does not withhold wages from a single employee in a single period would impede the administration of the tax code and thus could be guilty of a felony, regardless of whether that business avoided any taxes or intended to evade any taxes.

Document Retention. Daily decisions about the types of documents that a business prepares and maintains may also be seen as impeding administration of the Code. The Code and regulations impose broad recordkeeping obligations that are potentially limitless in scope and duration. See 26 U.S.C. § 6001 (requiring taxpayers to keep such records as the Secretary of Treasury prescribes); Treas. Reg. § 1.6001-1 (requiring taxpayers to keep records "as are sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown" on any tax return, and to retain such records "so long as the contents thereof *may become material* in the administration of any internal revenue law" (emphasis added)). Businesses invest a great deal of effort, time, and resources into creating and maintaining records sufficient to support their tax reporting. However, companies do not generally retain every document they ever create or generate every possible type of documentation that the IRS could ever want. The failure of a company to have available a document that the government believes would have been relevant to an IRS proceeding (even if the business is not aware of any IRS proceeding) could, under the Second Circuit's interpretation, impede the

administration of the Code and be chargeable as obstruction under the Omnibus Clause.

The types of documents that may be relevant to the administration of the Code and whose absence may impede that administration is vast. See United States v. Arthur Young & Co., 465 U.S. 805, 814 (1984) (explaining that Congress intended "to allow the IRS to obtain items of even *potential* relevance to an ongoing investigation"). It includes information regarding foreign tax credits for businesses that operate and pay taxes overseas, Treas. Reg. § 1.905-2(2); information regarding a business's earnings and profits for companies that make shareholder distributions, 26 U.S.C. § 6042(b)(3); Treas. Reg. § 1.6042-3(c); and information regarding an asset's basis – which is determined by reference to potentially decades-old records that the company may no longer have – in the case of a company selling assets, see, e.g., 26 U.S.C. §§ 1001, 1011; Treas. Reg. §§ 1.1012-1(a), 1.1016-1.

Indeed, the IRS has the right to challenge (and may challenge) a taxpayer's position long after the taxes are paid and, in some cases, long after having affirmatively accepted the taxpayer's position in earlier tax years, creating significant recordkeeping challenges that far exceed what most people understand to be their obligations with respect to tax records. See, e.g., Eaton Corp. v. Comm'r, 114 T.C.M. (CCH) 90 (2017) (rejecting IRS's argument that taxpayer misrepresented material facts during negotiations that took place fifteen years earlier on the basis of significant contemporaneous documentation the taxpayer had created and retained). The Second Circuit's interpretation of the Omnibus Clause creates a risk not only that the unavailability of

records itself would be a violation, but also that because they lack records to do so taxpayers may be unable to establish that tax positions adopted long ago were *not* efforts to obstruct the IRS.

Shareholder Guarantees. Particularly for small businesses, it is not uncommon for lenders to require that a shareholder or owner guarantee a loan made to the business. The IRS and taxpayers often disagree as to whether a shareholder's guarantee of a corporate debt results in the shareholder, rather than the corporation, being treated as the borrower for tax purposes (which impacts who is entitled to claim deductions for interest paid on the debt). See Plantation Patterns v. Comm'r, 462 F.2d 712, 723-24 (5th Cir. 1972) (guarantee of corporation's debt by shareholder and CEO of small business resulted in shareholder, rather than the corporation, being treated as the borrower entitled to deduct the interest for tax purposes). The determination is very fact-specific. For a sizeable fee, large companies will often, at the time they obtain the loan, obtain a letter from a bank stating that the bank would have been willing to extend a loan of the same amount to the company without the shareholder guarantee, just with more onerous terms (such as a higher interest rate) (a so-called "Plantation Patterns letter"). Such a letter promotes the administration of the tax code in the sense that in the absence of such a letter in an IRS audit, the IRS must engage in a complex, time-consuming, and expensive investigation. Thus, much like the failure to maintain a record of an expense, the failure of a business to obtain a Plantation Patterns letter (even though the IRS has never specifically required such a letter) could be viewed as an

impediment to the administration of the Code and to the IRS's ability to determine the proper taxes due.

Considering Retaining an Outside Accountant. Businesses are not obligated to hire an outside accountant or lawyer to provide tax services. Yet, they may consider doing so, and may even interview several before selecting one. Petitioner considered hiring an outside tax accountant and spoke to one about his tax situation, but ultimately decided not to retain the accountant. The Second Circuit affirmed Petitioner's conviction for (at least potentially) failing to provide to the accountant *whom he did not hire* all of the documentation relevant to his tax situation on the theory that such action impeded the administration of the tax code. Marinello, 839 F.3d at 224 & n.14. Similarly, it is not altogether unusual for a business to seek a second opinion on a complex tax question, and where the two opinions differ, the taxpayer can only follow one of them.[3] Surely the IRS's job might be made easier if every taxpayer retained a professional tax advisor and followed every bit of advice received (if, of course, the IRS on audit agreed with that advice – a not so small "if"); but the failure to do so (even if it impedes the administration of the Code) should not be – as the Second Circuit's decision makes it – a potential felony.

* * *

[3] Indeed, in a recent court decision involving a complex tax question, four tax advisors were consulted and each one expressed a different opinion as to the correct answer. Williams Cos. v. Energy Transfer Equity, L.P., 159 A.3d 264, 269-70 (Del. 2017).

All of these instances reflect cases in which a taxpayer may be argued to have taken actions that impede the administration of the Code by choosing one course of action in circumstances where choosing an alternative course of action would have resulted in the payment of a different amount of taxes, or where the course chosen would have required the IRS (if it had audited) to do more extensive fact-finding and analysis to determine whether the right amount of taxes were paid. Given the complexity and ambiguity of the Code, and the fact-sensitive nature of the determinations it requires, however, it will always be relatively easy for a prosecutor after the fact to say that an action taken with no intent at all to evade taxes had the effect of generating the wrong amount of tax revenue or making the tax authorities' job more difficult and thus impeding the administration of the Code.

Absent a requirement that the government prove that the taxpayer was aware of a specific ongoing tax collection procedure, it would remain open to prosecutors to argue that the target of any investigation violated the Omnibus Clause through nothing more than business decisions regarding the organization of its affairs, on the theory that such decisions would have made the IRS's ability to determine the amount of taxes due more difficult or had the effect of generating less tax revenue than what the government could claim – on the basis of post hoc judgment – was required to be paid under the Code.

B. The "Corruptly" *Mens Rea* Does Not Meaningfully Limit the Omnibus Clause

The government may argue that none of these activities would fall within the scope of the Omnibus Clause unless they were taken "corruptly." If the taxpayer had only taken the actions that the government would have wanted the taxpayer to take, the taxpayer would not have been subject to criminal charges. According to the government's argument, only those acts of tax minimization that are inconsistent with the Code and that are taken with the intent to obtain an unlawful benefit for the taxpayer or someone else violate the Omnibus Clause. Br. for the United States in Opp'n 11 (May 22, 2017) ("[C]ourts have found the necessary limits in the statute's *mens rea* requirement").

But the Omnibus Clause, and the cases interpreting its "corruptly" requirement, give cold comfort. The "corruptly" element requires only that the defendant have an intent to benefit and that the benefit turns out to be unlawful. See, e.g., United States v. Floyd, 740 F.3d 22, 31 (1st Cir. 2014) ("corruptly" means "an intent to procure an unlawful benefit either for the actor or some other person" (citations omitted)); United States v. Kelly, 147 F.3d 172, 177 (2d Cir. 1998); United States v. Reeves, 752 F.2d 995, 1001 (5th Cir. 1985); see also United States v. Wilson, 118 F.3d 228, 234 (4th Cir. 1997) ("The [defendant's] acts themselves need not be illegal."). It does not require the government to prove that the defendant intended to evade taxes or have any knowledge that its conduct was unlawful. But our law encourages businesses – as a matter of tax policy and, in some cases, as a

matter of fiduciary duty – to take actions to benefit themselves, i.e., to pay no more taxes than are rightfully due and, where that is not clear, businesses are not obligated to select the highest tax bill possible. The tax law is complex and fact-dependent and it would not be difficult for the government to allege after the fact that an action that the business claimed was in good faith conferred a benefit that was not justified, i.e., was unlawful. And, as Judges Cabranes and Jacobs observed dissenting from denial of rehearing *en banc*, "the line between aggressive tax avoidance and 'corrupt' obstruction can be hard to discern, especially when no IRS investigation is active." Marinello, 855 F.3d at 457.

Prior to the Second Circuit's decision (and the decisions of other courts adopting the same interpretation), the consequence of an incorrect judgment or the failure to have created or maintained a document to support a tax position might be a disallowed deduction, the shifting of the burden of proof or, at worst, the imposition of a penalty. See 26 U.S.C. § 6662 (imposing an accuracy-related penalty on underpayments). For example, failing to affirmatively take steps to ensure all necessary requirements are met in a business restructuring may result in the transaction being taxable to all parties. See id. §§ 351-368. Likewise, where a company lacks the records needed to substantiate its tax position, a shareholder distribution may be treated as a taxable dividend or a sale of company assets may be taxed at the full sale value without an adjustment for basis. See id. § 6042(b)(3); Treas. Reg. § 1.6042-3(c).

But under the Second Circuit's decision, virtually every business decision taken because of its potential tax consequences could be subject to review and potentially prosecutable. An "unlawful benefit" could be simply paying less taxes than was legally required, on the basis of having adopted an interpretation of the Code that a court ultimately determines was incorrect. It could also be a benefit wholly unrelated to taxation – for example, employing undocumented workers, unknowingly making a charitable donation to a fraudulent charity, or violating government procurement rules. In each of these cases – and countless others – under the Second Circuit's interpretation and in the absence of any independent requirement that the defendant know of a pending IRS proceeding, it could be said that the defendant has acted "corruptly" by either receiving or conferring on someone else a benefit that, it turns out, the law does not permit.

II. The Broad Interpretation of the Omnibus Clause Risks the Specter of Arbitrary Enforcement

This Court has long expressed the concern that criminal statutes not be given vague and overbroad interpretations that could give rise to the risk of selective, discriminatory enforcement. United States v. Reese, 92 U.S. 214, 221 (1875) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."). Recent jurisprudence reflects a trend of reading broadly-worded criminal statutes in a manner that

gives effect to their clear purpose and notice to potential offenders of what is prohibited. See United States v. Aguilar, 515 U.S. 593, 599 (1995) (holding that obstruction of justice only occurs where "the act [has] a relationship in time, causation, or logic with the judicial proceedings"); United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 405, 408 (1999) (interpreting the illegal gratuity statute to require payment of a bribe or gratuity in connection with a "*specific* official act" and rejecting an interpretation that would permit prosecutions limited by "nothing but the Government's discretion" (emphasis added)); McDonnell v. United States, 136 S. Ct. 2355, 2373 (2016); Yates v. United States, 135 S. Ct. 1074, 1079 (2015); Skilling v. United States, 561 U.S. 358, 408-09 (2010).

As this Court has recognized, vague and overbroad laws serve to invite selective and discriminatory enforcement. "If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted." Morrison v. Olson, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting) (quoting Robert H. Jackson, The Federal Prosecutor, Second Annual Conference of United States Attorneys, April 1, 1940); see also Kolender v. Lawson, 461 U.S. 352, 358 (1983) (criminal law cannot sanction "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections" (alteration in original) (citation omitted)); Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972) (holding that unconstitutionally vague vagrancy statute was subject to "harsh and

discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure" (citation omitted)); Screws v. United States, 325 U.S. 91, 149 (1945) (Roberts, Frankfurter & Jackson, JJ., dissenting) ("[M]isuse of the criminal machinery is one of the most potent and familiar instruments of arbitrary government[;] proper regard for the rational requirement of definiteness in criminal statutes is basic to civil liberties."). For this reason and others, this Court's jurisprudence in this regard reflects a proper "restraint in assessing the reach of a federal criminal statute," Aguilar, 515 U.S. at 600, consistent with both separation of powers, see Dowling v. United States, 473 U.S. 207, 213-14 (1985); Reese, 92 U.S. at 221, and the traditional rule of lenity governing the interpretation of criminal statutes, see United States v. Santos, 553 U.S. 507, 514-21 (2008), see also Baggett v. Bullitt, 377 U.S. 360, 373 (1964) ("Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law."); United Dominion Indus. v. United States, 532 U.S. 822, 839 (2001) (Thomas, J., concurring) ("At a bare minimum, in cases such as this one, in which the complex statutory and regulatory scheme lends itself to any number of interpretations, we should be inclined to rely on the traditional canon that construes revenue-raising laws against their drafter.").

The Second Circuit's interpretation gives rise to precisely these concerns. By threatening to sweep into the scope of the Omnibus Clause and make into a felony ordinary business conduct engaged in to minimize taxes and maximize profits, the court's interpretation hands the prosecutor a weapon with

which to attack businesses not because of what they have done but because of who they are.

The *in terrorem* impact of that interpretation would be momentous. Our country's history is replete with examples of legitimate businesses publicly attacked because of who owned them and the religious and political beliefs of the owners, what products they sold, whom they chose to do business with, or who they employed. In the early nineteenth century, as today, those businesses included financial institutions whose lending activities made them an easy target of attack. With the growth of the country's population and the industrial revolution, it included businesses run or owned by minorities or immigrants, as well as by those who managed large aggregations of wealth and were known as "robber barons." See David E. Bernstein & Ilya Somin, Judicial Power and Civil Rights Reconsidered, 114 Yale L.J. 591, 620 (2004) (discussing the use of "facially neutral legislation" by southern planters to suppress African American economic mobility after Reconstruction); see also Matthew Josephson, The Robber Barons: The Great American Capitalists, 1861-1901 359 (Transaction Publishers 2010) (1934) (regarding passage of the Sherman Anti-Trust Act, quoting an unnamed senator to have "remarked that no one knew what the bill would do to the Trusts, but nearly everyone agreed that 'something must be flung out to appease the restive masses'"). Businesses that peddled in products considered licentious were not free from attack. Champion v. Ames, 188 U.S. 321, 330 (1903) (affirming conviction of freight carrier for transporting lottery tickets across state lines).

Today, public opinion has turned against or could turn against companies that sell products considered to be controversial (at least in some quarters), see, e.g., Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310-11 (2016) (reproductive health services), Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 570-71 (2001) (tobacco products), City of Philadelphia v. Baretta U.S.A. Corp., 277 F.3d 415, 420-22 (3d Cir. 2002) (firearm manufacturers), or whose owners are controversial, or who are controversial because of whom they sell to or refuse to sell to or whom they employ. In 2014, the staff of the House Committee on Oversight and Government Reform observed that the Justice Department's investigation of banks and payment processors was in fact an initiative to target the legal (but politically unpopular) payday lending industry. See Staff of U.S. H.R. Comm. on Oversight and Gov't Reform, 113th Congress, The Department of Justice's "Operation Choke Point": Illegally Choking Off Legitimate Businesses? (May 29, 2014), http://oversight.house.gov/wp-content/uploads/2014/05/Staff-Report-Operation-Choke-Point1.pdf. Likewise, a 2013 report from the Treasury Inspector General for Tax Administration outlines IRS agents' efforts to target "Tea Party" and other conservative groups for additional scrutiny. See, e.g., Treasury Inspector Gen. for Tax Admin., U.S. Dep't of the Treasury, Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review, (May 14, 2013), https://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf.

It is difficult to imagine a creative prosecutor – armed with all of the resources of the federal government – not being able to find a crime to

investigate in the case of all of these types of companies under the Second Circuit's broad interpretation of the Omnibus Clause. The risk is not only theoretical. Over time, and in recent years, prosecutors have turned to the Code to find violations when faced with difficulties prosecuting (or investigating) non-tax crimes. See, e.g., Olive v. Comm'r, 139 T.C. 2 (2012) (tax collection case against medical marijuana distributor for deducting business expenses on the basis that expenses related to unlawful conduct are not deductible). It is difficult, for example, to prove that a company suspected of fraud or of money laundering has actually engaged in fraud or money laundering. How easy (and tempting) it would be, instead of engaging in the arduous process of determining that a business has engaged in such an illegal act, to investigate whether the company has preserved all records relevant to its tax returns or has taken a tax position in an area where the law is uncertain and then to charge a felony under the Omnibus Clause and put the company out of business, but not for the reason the company originally came to the government's attention. And it would not necessarily be that such a prosecutor would need to lay formal charges under the Omnibus Clause to achieve her purpose; the threat of such charges – coupled with broad and vague statutory elements – provides substantial leverage for forcing settlements or admissions, potentially even of other substantive violations.

III. The Second Circuit's Unbounded Interpretation of the Omnibus Clause Will Vastly Increase the Costs and Burdens of Tax Compliance

The Second Circuit's interpretation of the Omnibus Clause would also dramatically increase the cost of doing business for American companies. The resultant burdens would fall especially hard on small businesses, which the Small Business Administration recently estimated spends "three times more per employee on tax compliance than their largest counterparts." Small Bus. Ass'n, Frequently Asked Questions (Jan. 2011), https://www.sba.gov/sites/default/files/sbfaq.pdf.

This Court long ago observed that the Code is "highly specialized and so complex as to be the despair of judges." Dobson v. Comm'r, 320 U.S. 489, 498 (1943). In the intervening decades, the laws have become no less specialized and complex. See Jason Russell, Look At How Many Pages Are in the Federal Tax Code, Wash. Examiner, (Apr. 15, 2016), http://www.washingtonexaminer.com/look-at-how-many-pages-are-in-the-federal-tax-code/article/2563032 ("Americans are rightfully frustrated with the complexity of the 74,608-page-long federal tax code," which "is 187 times longer than it was a century ago."). As a consequence, most large businesses employ large tax departments to make sure that the company has filed and accurately completed all required forms, has transmitted the appropriate notices to its employees or independent contractors, and has maintained all necessary books and records. See KPMG, A Look Inside Tax Departments Worldwide and How They Are Evolving 3 (2016), https://assets.kpmg.com/content/dam

/kpmg/xx/pdf/2016/11/global-tax-benchmarking-survey.pdf (survey of large companies revealed, on average, that tax departments employ 16 full-time employees at headquarter location and 27 full-time employees at other locations); see also George Contos et al., IRS, Taxpayer Compliance Costs for Corporations and Partnerships: A New Look 7 (2009), https://www.irs.gov/pub/irs-soi/12rescontaxpaycompliance.pdf (estimating average income tax compliance costs in 2009 for companies with $500 million or more in assets as $471,000). The tax department will manage compliance with complex tax rules arising from managing employee benefit and retirement plans, carried business expenses, calculations of profits and earnings, and similar matters. KPMG, supra, at 3 (majority of survey respondents reported tax department responsible for "tax returns/compliance," "business unit support and consulting," "transaction taxes," "accounting for income taxes," and "transfer pricing").

But a tax department will only have at its disposal those records maintained by the company, which will likely have adopted a document retention policy that provides for the periodic destruction of documents in light of storage costs, burdens on employees' time and the ability to access information electronically, and possible litigation discovery concerns, among other considerations. Christopher V. Cotton, Document Retention Programs for Electronic Records: Applying a Reasonableness Standard to the Electronic Era, 24 J. Corp. L. 417, 419 (1999). And even where large organizations with sophisticated tax departments employ best practices to maintain appropriate records, some amount of human error is inevitable. Diane L.

Yetter & LeAnn Luna, The Best Practices of a Best-in-Class Corporate Tax Department, 23 J. Multistate Tax'n & Incentives 20, 48 (2013) (survey of large companies revealed that three quarters of companies "were unable to locate records required for audit because of a violation of the company's record-retention policy").

The Second Circuit's rule, if upheld by this Court, would effectively require small businesses to establish (at great cost to themselves and to the American economy) the same elaborate tax compliance structures used by the largest companies for fear that, if they do not, they run the risk of federal prosecution and a felony conviction at the hands of some overzealous prosecutor. This case illustrates the point. Petitioner was convicted of violating the Omnibus Clause for conduct that might be said to have been engaged in by numerous small businesses: failing to keep books and records, discarding documents, and failing to employ and follow the advice of a tax accountant he had consulted. Historically, such conduct would be met by a disallowance of an expense or, at most, an administrative penalty and interest. See 26 U.S.C. § 6601 (accruing interest on underpayments of tax); id. § 6662 (applying a 20% penalty to an underpayment of tax if it results from negligence or disregard of rules or regulations or is a substantial underpayment of income tax, among other circumstances). Now, as a result of the Second Circuit's opinion, such conduct can be prosecuted as a felony punishable by years in prison.

As a matter of business judgment, of course, companies might well choose to invest in elaborate and extensive tax compliance procedures. Such procedures

would decrease the chances of errors or underpayments, but even such procedures could never assure that the business would not have made one or more judgment calls that the IRS might want to challenge. 26 U.S.C. § 7203; Garvey, Inc. v. United States, 726 F.2d 1569, 1573 (Fed. Cir. 1984). But by introducing the specter of potential felony charges for doing essentially anything that makes the IRS's job more difficult, the Second Circuit's interpretation of the Omnibus Clause changes risk reduction into a required policy and would dramatically increase the cost of doing business, particularly for small businesses.

IV. The Second Circuit's Interpretation Will Also Impede Development of Tax Law by Discouraging Litigation

The danger of the Second Circuit's interpretation of the Omnibus Clause arises not only from the tool that it gives an aggressive prosecutor (after the fact) to subject an unpopular business to prison, but also from the lever that it gives the IRS (before the fact) to threaten a recalcitrant taxpayer with prosecution if the taxpayer does not acquiesce to the IRS's interpretation of the Code.

The tax law of the United States has been the product, in part, of adjudication. The Code includes a carefully balanced compilation of incentives and disincentives for a taxpayer to take a tax position that the IRS may disagree with and, if that position is challenged by the IRS, to dispute the IRS's interpretation of the law, either by paying the disputed tax amount and filing a lawsuit in federal court or by bringing an action in the Tax Court. Even where the IRS has announced a position administratively (and

thus where the government might claim that the decision not to follow that position was willful), a taxpayer has the right to take a contrary position on a tax return and force the IRS to dispute that position (even if doing so would make administration of the Code more difficult).[4] That is how law is made. See, e.g., Limited, Inc. v. Comm'r, 286 F.3d 324, 327 (6th Cir. 2002) (taxpayer's interpretation of 26 U.S.C. § 956(c) was correct, even though IRS disfavored the result; subsequently the statute was amended to "fix" the flaw the taxpayer had brought to light); Grecian Magnesite Mining, Indus. & Shipping Co. v. Comm'r, 149 T.C. No. 3 (2017) (taxpayer was correct that an IRS Revenue Ruling from 1991 was invalid, resolving a significant uncertainty in the law); Altera Corp. v. Comm'r, 145 T.C. No. 3 (2016) (taxpayer was correct that a Treasury Regulation was invalid).

The Second Circuit's interpretation of the Omnibus Clause, however, gives the IRS a potent weapon with which to challenge any taxpayer who might otherwise be bold enough to challenge an IRS interpretation. In 2016, the IRS audited more than 1.1 million corporate and individual tax returns, and determined additional tax was due with respect to 81% of the individual and 42% of the corporate returns. See IRS, Data Book 23-24 (2016), https://www.irs.gov/pub/irs-soi/16databk.pdf.

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[4] Indeed, taxpayers are often precluded from asking a court to prospectively rule on whether an interpretation of the Code or other tax decision is correct. See, e.g., 26 U.S.C. § 7421(a) ("[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person[.]"); 28 U.S.C. § 2201 (2012) (exclusion of various tax matters from the Declaratory Judgment Act).

In almost 30,000 of the cases where the IRS determined additional taxes were due, the taxpayer disagreed (reflecting in excess of $12.2 billion in disputed tax liability). Id. at 28. The vast majority of these matters were resolved administratively. If, however, the IRS takes a position in an audit with which the taxpayer disagrees (even if the IRS has announced a regulatory position with which the taxpayer disagrees), the taxpayer has the right to obtain a judicial interpretation of the law. There is a substantial public interest in permitting – indeed, encouraging – parties to litigate good faith tax disputes. See Mortensen v. Comm'r, 440 F.3d 375, 385 (6th Cir. 2006) ("Reasonable minds can differ over tax reporting [even when] the IRS disallows certain transactions."). But what is "good faith" can be in the mind of the beholder (and determined only after the fact and after the damage is done) and our self-assessment tax system depends upon taxpayers believing that the system is fair, that everyone is subject to the same rules, and that disagreements will be resolved by an objective judiciary. Permitting taxpayers to challenge the IRS in court also encourages the government to draft clear and unambiguous tax laws and regulations, and ensures that the IRS follows those laws, even when the IRS disfavors the result or the taxpayer.

The Second Circuit's interpretation would undermine these checks and balances. IRS rules obligate an IRS examiner who determines that a taxpayer may have engaged in tax fraud to halt a civil audit and refer the matter to the IRS Criminal Investigation Division ("CID") and, if CID determines that prosecution is warranted, CID will refer the

matter to the Department of Justice. IRS, Internal Revenue Manual § 25.1.3 (Aug. 24, 2016), https://www.irs.gov/irm/part25/irm_25-001-003r.html. Treasury regulations also delegate to CID special agents a broad authority to refer any matter within the IRS's jurisdiction to the Department of Justice for investigation and prosecution. See Treasury Order 150-35 (July 10, 2000); Delegation Order 9-6, Internal Revenue Manual § 1.2.48.7 (Feb. 6, 2013), https://www.irs.gov/irm/part1/irm_01-002-048.html.

Under the Second Circuit's interpretation of the law, even a well-intentioned IRS examiner would be well within his discretion to refer a matter for further investigation where the taxpayer has done nothing more than taken a position that the IRS thinks is incorrect or has failed to maintain documentation that the IRS would like to see. CID would then investigate whether the taxpayer acted with the requisite intent to obtain an unlawful advantage. In that circumstance, it would be an intrepid taxpayer indeed who would be willing to incur the IRS's wrath and to face an investigation and potential indictment or conviction rather than to capitulate to the IRS examiner and concede that additional tax is due, even if that tax is not, in fact, due.

It is important to note that whether or not the IRS would make a criminal referral in any given matter, or whether the Department of Justice would be able to obtain an indictment or conviction, would be largely irrelevant. The danger of the broad interpretation of the Omnibus Clause adopted below is that it will deter taxpayers from judicially challenging IRS positions, particularly on issues deemed to be of importance to

the IRS and, thus, make the IRS both lawmaker and law interpreter. See NAACP v. Button, 371 U.S. 415, 433 (1963) ("The threat of sanctions may deter [the exercise of rights] almost as potently as the actual application of sanctions."). Such a result would be inconsistent with the statutory structure established by Congress – which recognizes that it is ultimately the role of the courts and not the IRS to interpret the laws passed by Congress – and is not justified by congressional intent or any common-sense interpretation of the Omnibus Clause.

CONCLUSION

For the reasons set out above, *Amici* respectfully urge this Court to reverse the judgment below, and hold that the Omnibus Clause requires that a defendant have been aware of a specific IRS process and acted with the intent to obstruct or impede it.

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